STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2003
v	No. 242345 Wayne Circuit Court
JAMES TAYLOR, also known as EDWARD LEVERETTE, Defendant-Appellant.	LC No. 01-000358-01

Before: Wilder, P.J., and Griffin and Gage, JJ

PER CURIAM.

Defendant James Taylor[1] appeals as of leave granted from his convictions of felony-firearm, MCL 750.227b, and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), following a bench trial. Defendant was sentenced to two years' probation for possession of a controlled substance and two years' imprisonment for felony-firearm. We affirm but remand with instructions for the trial court to correct an error in the judgment of sentence.

Officers arrested defendant inside a suspected drug house during a police raid. The first officer to enter the house testified that defendant was seated at a table cutting up cocaine with a razor blade, and that a handgun was on the table within his reach. Defendant claims that he had no knowledge of any drugs or firearms in the house, and that he had just stopped by to pick up his car, which was being repaired by a resident of the house. Defendant testified that he was on the telephone in the kitchen when the officers arrived. Testimony from other witnesses, including officers involved in the raid, differed slightly regarding defendant's precise location in the house when the officers arrived.

Defendant claims that there was insufficient evidence to support the convictions, and alternatively, that he is entitled to a new trial because the verdict is against the great weight of the evidence. This Court reviews claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; NW2d 322 (2002). When reviewing the sufficiency of the evidence, this Court examines whether the evidence presented by the prosecutor was sufficient to permit a

[1] Defendant is also known as Edward Leverette.

rational trier of fact to find "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich 1201 (1992). In making that determination, this Court views the evidence in a light most favorable to the prosecution. *Id.*

On a claim that a verdict is against the great weight of the evidence, this Court will not grant a new trial unless failure to do so would result in a miscarriage of justice. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Issues of witness credibility are left to the factfinder, *id.*, and findings of fact will not be set aside unless they are clearly erroneous. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991), citing *People v Stoughton*, 185 Mich App 219, 227; 460 NW2d 591 (1990).

The elements of MCL 333.7403(2)(a)(v) are "possession of a controlled substance with knowledge or intent." *People v Pegenau*, 447 Mich 278, 303; 523 NW2d 325 (1994). Possession may be actual or constructive. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002), citing *Wolfe*, *supra* at 521. Proximity to narcotics, considered with other indicia of control over them, is sufficient to establish constructive possession. *Wolfe*, *supra* at 520.

To be guilty of felony-firearm, MCL 750.227b, the defendant must carry or possess a firearm while committing or attempting to commit a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Constructive possession of the firearm can be shown where the defendant knows the location of the weapon and can easily reach it. *Id.* at 437, citing *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989).

Here, the evidence is sufficient to support the convictions. The first officer to enter the house testified that defendant was sitting alone at a table, cutting up cocaine, and was within reach of a firearm. Although other officers' testimony conflicted slightly regarding the layout of the home and defendant's precise location, conflicting testimony will not necessarily mandate a finding of insufficiency of the evidence. *Lemmon*, *supra* at 644-646. Where the evidence conflicts, the conflict is resolved in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

From the record, it is clear that the court was aware of and considered the differences in testimony. In fact, because of the discrepancies, the court determined there was insufficient evidence to convict defendant of the charged crime, delivery of cocaine, MCL 333.7401(2)(a)(iv). Therefore, viewing the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient for a reasonable factfinder to determine that defendant was in actual or constructive possession of both the narcotics and the weapon. Moreover, we do not have a definite and firm conviction that a mistake was made in the trial court's determination of defendant's location in the house and his control over the narcotics and firearm. Therefore, we reject defendant's claim that the verdict is against the great weight of the evidence.

Defendant next argues that he was deprived of effective assistance of counsel when his attorney failed to object during the prosecutor's cross-examination regarding defendant's prior bad acts. Because this issue is unpreserved, see *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001), we review this claim for errors apparent on the record.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms" and that there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different . . . ." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), citing *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Additionally, defendant must show that the "attendant proceedings [were] fundamentally unfair or unreliable." *Rodgers*, *supra*, citing *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). There is a presumption that a defendant received effective assistance of counsel, and the defendant has a heavy burden of proof to show otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant complains that his counsel failed to object when the prosecutor cross-examined him regarding his alias,[2] his prior conviction for carrying a concealed weapon,[3] a pending assault with intent to murder charge, and a 1993 bench warrant. Defendant neglects to mention, however, that his own counsel questioned him on direct examination regarding his use of an alias. In response to defense counsel's questions, defendant volunteered that he used the name "James Taylor" because he thought there was a "gun charge" pending against him from nine years ago.

Thus, the only questionable testimony concerned the pending assault charge. Because virtually all proffered evidence is prejudicial to a criminal defendant, it must be determined whether the evidence is unfairly prejudicial. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995), citing *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). Where defendant is tried in front of a judge rather than a jury, however, it is more difficult to sustain the burden of proving that erroneously admitted evidence affected the outcome of the trial. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992), citing *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). "Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *Wofford*, *supra.*

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[2] Contrary to what counsel for defendant states in his brief, defense counsel did object regarding the alias question, although she objected on the ground the question had been asked and answered. This does not effect the preservation of this issue, however, because an objection regarding the admission of evidence must have been made on the same ground that is asserted on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

[3] Although appellate defense counsel references a prior CCW conviction, there is no record evidence supporting that claim. Rather, it appears that counsel is mistaking the 1993 bench warrant regarding CCW for a prior conviction. Thus, there were three pieces of evidence at issue: the 1993 bench warrant, the use of an alias, and the pending assault charge.

Here, although the information about defendant's prior record and pending trial was irrelevant to the case, there is no evidence that the trial court relied on the information in making its determination of defendant's guilt. Defendant offers no argument concerning how the error affected the outcome but, instead, states simply that there was a "reasonable probability that for his [sic] failure to object, the result would have been different." Thus, defendant has not met his burden of showing that the error was harmful. See *People v Christel*, 449 Mich 578, 594; 537 NW2d 194 (1995), citing *Pruitt v Georgia*, 296 SE2d 795 (1982).

Defendant next argues that his right to confront witnesses was violated when the court granted the prosecution's request to strike one of its witnesses. However, defendant waived this issue when he failed to request the witness at the end of his case-in-chief. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001), citing *United States v Griffin*, 84 F3d 912, 924 (CA 7 1996), citing *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). When the court struck the witness, it told defendant that, after defendant presented his case, the court would reconsider whether it agreed with the prosecutor that the witness's testimony was cumulative. Defense counsel, however, did not subsequently request that the witness be called. Thus, there is no indication that the trial court would have refused defendant's request to have the witness testify on his behalf, and, consequently, there is no error to review.

Finally, defendant argues that his judgment of sentence should be corrected because it erroneously reflects a probationary sentence for the drug conviction when the court actually sentenced him to jail. Defendant is mistaken. While the trial judge initially gave defendant a jail sentence, it then set that sentence aside and sentenced defendant to two years' probation. Thus, the judgment of sentence is accurate in that regard. However, as the prosecutor points out, under the felony-firearm statute, MCL 750.227b(2), a sentence of probation may not run consecutively to the two years' imprisonment mandated by the felony-firearm statute. *People v Brown*, 220 Mich App 680, 683; 560 NW2d 80 (1996). Thus, the judgment of sentence, which reflects consecutive sentences, should be corrected to state that defendant's sentences are concurrent. MCR 7.208(C)(2).

Affirmed, but remanded to correct an error in the judgment of sentence. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage